United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-7339

IN THE

United States Court of Appeals

For the Second Circuit

BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,
Plaintiffs-Appellees,

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY and WILLIAM J. RONAN, W. PAUL STILLMAN, JAMES G. HELLMUTH, VICTOR R. YANITELLI, ANDREW C. AXTELL, GEORGE F. BERLINGER, MILTON A. GILBERT, ROBERT R. DOUGLAS, JAMES C. KELLOGG, III, GUSTAVE L. LEVY, MATTHEW NIMETZ, ALAN SAGNER,
Defendants-Appellees,

and

TOWN OF HEMPSTEAD, INCORPORATED, VILLAGE OF LAWRENCE, INCORPORATED, VILLAGE OF CEDARHURST, INCORPORATED, VILLAGE OF ATLANTIC BEACH, and ROBERT F. CHECK, MONA GOTTESMAN, and HERBERT WARSHAVSKY,
Applicants for Intervention-Appellants.

On Appeal from Order of United States District Court for the Southern District of New York, Judge Milton Pollack, Denying Appellants' Motion to Intervene

REPLY BRIEF OF APPELLANTS ON APPEAL

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REPLY BRIEF OF APPELLANTS

The Port Authority, et al., has filed no brief in opposition to the appeal of the appellants, the Town of Hempstead, et al. Only the airlines-appellees are opposing the intervention of the Town of Hempstead, et al., in the case at bar.

The brief of the airline-appellees completely ignores the fact that the District Court found that appellants satisfied the two interest requirements of Rule 24(a)(2) of the Federal Rules of Civil Procedure (A113), in that they possessed

an interest relating to the transaction which is the subject of the pending action and that the ability of the appellants to protect such interest may be impaired or impeded by the District Court's disposition of the action (A113).

Because the airlines' brief has argued that appellants failed to satisfy these two requirements of Rule 24(a)(2), this reply brief will demonstrate the propriety of the District Court's holdings and the fallacy of the airlines' argument.

I.

APPELLANTS HAVE THE REQUIRED INTEREST TO INTERVENE

The District Court, in discussing the criteria of Rule 24(a)(2) in connection with appellants' motion to intervene held:

> "The proposed intervenors have little difficulty meeting the first two of these criteria. As the town governments, residents, community groups and environmental organizations located next to the airport's runways, the applicants have a strong, palpable interest in avoiding the operation of an aircraft whose take-off noise levels may be considerably more intrusive than those of existing aircraft. This interest seems sufficient to constitute an interest relating to the instant law suit and to the Port Authority's decision to bar the plane temporarily." (A113).

This holding of the District Court is sustained by the facts and the law.

A. The Facts

The appellants are the real parties in interest in the pending action. Appellants allege in their verified motion that the proposed use of JFK by the airlines' Concorde aircraft will proximately cause injury to their person, damage to their property and adversely affect the quality of their environment (A61-65). Appellants' interest is in avoiding this injury and damage resulting from the emission of noise by the Concorde which is not less than four times as intense and severe as that of the loudest existing aircraft.

These facts are undisputed and are matters of public knowledge as disclosed in the press and news media since operation of the Concorde was begun at Dulles Airport May 24, 1976 (A106-A110).

The foregoing matters led the District Court to properly conclude that, "the applicants have a strong, palpable interest in avoiding the operation of an aircraft" of the Concorde type (A113).

It is further clear that the Resolution of the Port Authority temporarily barring the Concorde's operation at JFK is not only a proper act of an airport operator or proprietor, but also such resolution is for the benefit of appellants. (A39-A42). This becomes readily apparent from reading Exhibit B to the Complaint of the airlines (A36-A41).

B. The Law

This Honorable Court has held that the required interest to intervene is present where the applicants for intervention (a) are benefited by a regulation and (b) which affects the economic interests of said applicants for intervention. In a proceeding attacking the validity of a regulation preventing the advertising the price of prescription drugs, the District Court denied a motion to intervene brought by a pharmaceutical association and three individual pharmacists. This Court, in New York Public Interest Research Group, Inc. et al. v. The Regents of the University of the State of New York 516 F2d 350 (2Cir.1975), reversed the District Court and granted the motion to intervene. This Court held at p.352:

> "**There can be little doubt that the challenged prohibition***affects the economic interest of members of the pharmacy profession.***With respect to the association of pharmacists, we hold that it has

> a sufficient interest to permit it to intervene since the validity of a regulation from which its members benefit is challenged. See General Motors Corp. v. Burns, 50 F.R.D. 401 (D.C. Hawaii 1970)."

In the case at bar the airlines have challenged the validity of the Resolution of the Port Authority, just the same as the consumer groups attacked the validity of the regulation promulgated by the Regents in the above cited New York Public Interest case. The Regents' regulation was one from which intervenors benefited and which affected their economic interest, so also in the case at bar, the Resolution of the Port Authority, temporarily banning the Concorde aircrafts from JFK, is one from which appellants benefit (A35-A41), and which protects appellants from economic loss as well as from injury to their person. Indeed, as alleged in appellants' verified motion the intensity of the noise emitted by the Concorde is so severe as to cause shock to the nervous system and other personal injuries to appellants as well as economic loss (A61). The need for this ban is clear from reading Exhibit B to the airlines' complaint (A35-A41).

As stated in the New York Public Interest case, clearly these appellants who surround JFK, with their exposure, "have an interest in the transaction which is the subject of this action regardless of the intent of the Regents (Port Authority) in promulgating the regulation." - 516 F2d 351.

The foregoing Per Curiam holding of the Court of Appeals is determinative of the interest question in favor of appellants in this case. The interest of appellants is not only economic but includes avoiding serious personal injury as well. It also embraces the right to maintain the quality of the environment unimpaired. The validity of the Resolution of the Port Authority, from which the appellants benefit, is being challenged by the airlines. It is clear that the outcome of this case will substantially and directly affect these appellants. This is all that the law requires.

The following cases are in accord with the "interest" holding of this Court in the New York Public Interest case: General Motors v. Burns 50 F.R.D. 401, cited by this Court in the New York case, intervention granted, based upon potential economic loss depending on validity vel non of a statute; Atlantic Refinning Co. v. Standard Oil Co. 304 F2d 387 (DC Cir.1962) intervention by Independent Refiners denied by district court, reversed on appeal, which held sufficient interest present where a statute, whose validity was questioned, conferred an economic benefit on intervenors; Ford Motor Co. v. Bisanz Bros., Inc. 249 F2d 22 (8Cir. 1957) district court denied motion to intervene in an action to abate a nuisance of a railroad in operating a railroad storage yard which served intervenor as a shipper, the court of appeals found that the economic interest of the shipper would be affected by

the outcome of the action and reversed the district court; Nuesse v. Camp 385 F2d 694 (DCCir.1967) a denial of motion to intervene by the district court was reversed by the court of appeals because the intervenor was held to have had a sufficient interest in HOW a particular question should be decided in a pending litigation, to authorize the intervention.

Any disposition of the pending litigation adverse to the Port Authority will permit the operation of the Concorde causing the injuries and damages alleged in the verified motion of appellants in paragraphs 9, 10, 13 and 16 (A61-A62,A63-A65). This constitutes the "direct substantial and legally protectable interest" which the law requires for appellants' intervention in the proceeding between the airlines and the Port Authority.

It is clear from the foregoing law and the facts that Judge Pollack's holding that appellants "have a strong, palpable interest in avoiding the operation of" the Concorde aircraft, which is the subject matter of the pending litigation, is eminently correct and properly satisfies the "interest" requirement of Rule 24(a)(2) of the Federal Rules of Civil Procedure.

The brief of the airlines argues that appellants do not have the required interest because "they make no claim that any of them has the right, power of authority to adopt or enforce any resolution, order or the like that would affect Concorde operations at JFK," (p.5-6).

Such an argument presupposes that intervenors must have the identical interest in the proceeding as that possessed by the parties. This just is not the law. This contention of the airlines was considered and rejected by the United States Court of Appeals for the Fifth Circuit in Diaz v. Southern Drilling Corp. 427 F2d 1118 at 1124, where the court in discussing the interest of the intervenor held:

> "***We do not believe, however, that the interest has to be of a legal nature identical to that of the claims asserted in the main action, as appellants seem to suggest. All that is required by the terms of the rule is an interest in the property or other rights that are at issue, provided the other elements of intervention are present.***" (emphasis ours)

It is perfectly plain that the interest of the appellants in being free from injury and damage resulting from the operation of the Concorde is substantial and is entitled to protection.

It is not necessary that the appellants allege any right which would require the Port Authority to regulate the Concorde operation in order to be entitled to intervene. In Atlantic Refining Co. v. Standard Oil 304 F2d 387, at 394 (8Cir. 1962), the Court of Appeals ordered intervention where the intervenors had no rights against the parties to the litigation. The

Court held:

> "But, the appellants in No. 16,725 cannot maintain an action against Standard to have §10(b) adjudged valid and if Standard obtains a judgment in the action, adjudging such section to be invalid, there is no remedy they can invoke against Standard to obtain redress for the substantial injuries they will suffer as a result of such judgment. Such judgment will be as final and conclusive to them as if they were bound by it under the doctrine of res judicata. Hence, intervention is vital to the appellants in No. 16,725."

So also in the case at bar, a decision of District Court permitting the Concorde to operate at JFK will result in substantial injuries to the person and property of appellants and "intervention is vital to the appellants".

To the same effect are the following cases: Textile Workers Union of America v. Allendale Co. 226 F2d 765 (DC Cir.1955); Ford Motor Co. v. Bisanz Bros. Inc. 249 F2d 22 (8Cir.1957); Kozak v. Wells 278 F2d 104 (8Cir.1960); and New York P.I.R.G. v. Regents of N.Y.U. 516 F2d 350 (2Cir.1975).

II.

APPELLANTS' ABILITY TO PROTECT THEIR INTEREST MAY BE IMPAIRED OR IMPEDED BY THE DISPOSITION OF THE LITIGATION

The District Court, in ruling on the appellants' motion to intervene further held:

"Secondly, the outcome of this suit may well impair the would-be intervenors' ability to protect their interests; should the airlines prevail, not only would the Concorde be permitted to fly, but this Court's decision might immunize the Port Authority from any tort liability in a subsequent action brought by these applicants for intervention. Cf. Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525,535 (1959)." (A113)

This holding of the District Court is sustained by the facts and the law.

The Facts and The Law

The verified motion of the appellants and the affidavits of Warshavsky and Check assert that the Port Authority will be called upon to account for the injuries and damages caused by the operation of the Concorde (A66, A84, A91). This tort liability of an operator of an airport is recognized in Griggs v. Allegheny County 369 U.S. 84 (1962). The avoidance of this tort liability, on the part of the Port Authority, is certainly one of the objectives the Port Authority will seek in the pending litigation with the airlines. That is to be expected, and it would be contrary to human nature to expect the Port Authority to do otherwise.

These facts have been recognized by the District Court and are found in the record of the proceedings. Indeed, it is interesting to note that the Port Authority in its answering

papers to the airlines' motion for summary judgment takes the position that, "Not only do we believe that Griggs was wrongly decided as a matter of technical law, but we believe that its result was undesirable***". (Defendants' Memorandum In Opposition to Plaintiffs' Motion For Summary Judgment p. 21 footnote 8, filed August 17, 1976). This attack on the Griggs case is the opening gun to bring the Port Authority within the rationale of the District Court as exemplified by the Court's citation of Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525, 535 (1959).

The District Court's finding that its decision in the instant litigation might immunize the Port Authority from subsequent tort liability to the appellants constitutes an impairment of appellants ability to protect their rights to recover from the Port Authority. Even though such decision would not be strictly res judicata as to appellants, still such a decision would satisfy the requirements of Rule 24(a)(2) as to impairing their ability to protect their interest -- New York Public Interest Research Group case.

In that case this Court held:

> "We think it likewise clear that the pharmacists and the association are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect their interests. We are not persuaded by the contention of plaintiffs that the pharmacists may protect their interest after an adverse decision in the instant case by attacking any new regulation on constitutional, antitrust or unfair competition

grounds. Such contention ignores the possible stare decisis effect of an adverse decision." 516 F2d 352

To the same effect are: Nuesse v. Camp 385 F2d 694, 701, (DC Cir.1967); Atlantic Development Corp. v. United States 379 F2d 818, 826 (5Cir.1967); Martin v. Travelers Ind. Co. 450 F2d 542, 554 (5Cir.1971), and In re Oceana International, Inc. 49 F.R.D. 329,332, (S.D.N.Y. 1970).

From the foregoing undisputed facts and well settled law, it is perfectly plain that Judge Pollack's finding is correct that appellants have satisfied the second requirement of Rule 24(a)(2). Since a disposition of the pending litigation may immunize the tort liability of the Port Authority, is fully sustained by the record in this proceeding, it follows that the ability of the appellants may not only be impaired but destroyed.

The foregoing finding of Judge Pollack has an additional consequence. It recognizes and establishes an adversity of interest between the appellants and the Port Authority.

III.

REPRESENTATION OF APPELLANTS' INTEREST BY THE PORT AUTHORITY IS NOT ADEQUATE

Appellants' earlier brief pointed out that the finding of Judge Pollack that appellants "stumbled" in their efforts to satisfy the "representation" requirement of Rule 24(a)

(2), constitutes error to reverse the order of the District Court denying the motion to intervene.

This error of the District Court is attributed to:

(a) the Court's failure to apply the proper burden of proof as taught in Trbovich v. United Mine Workers, 404 U.S. 528, 538, ie., the burden of showing inadequacy "should be treated as minimal" (Orig. Br. pp. 10-11).

(b) the failure of the District Court to recognize that the Port Authority will, quite naturally, seek, in the pending litigation, to have the District Court's decision immunize its tort liability to appellants in later litigation - hence the Port Authority represents an interest adverse to that of the appellants (Orig. Br. pp. 11-15).

(c) the failure of the District Court to recognize the divergent interest of the Port Authority (in fending off the airlines challenge to its authority as an airport operator to establish rules for use of its runways) and that of the appellants (in seeking to protect their quality of life and themselves from injury to their person and property arising out of the operation of the Concorde at JFK), and accepting a "common outcome" desired by both appellants and the Port Authority as the proper criteria for determining the issue of adequacy of representation (Orig. Br. pp. 15-17).

(d) the failure of the District Court to recognize and compare the divergent interests and from such comparison to conclude that the Port Authority could not, compatible with its own interests mount a vigorous defense of its position as an airport operator in the light of its potential liability to appellants predicated upon that same capacity as airport operator (Orig. Br. pp. 17-22).

The foregoing errors account for the District Court's decision to deny the motions to intervene, and have been discussed at length in appellants original brief (Orig. Br.) before this court. That argument will not be repeated.

The argument advanced by the brief of the airlines may accurately be characterized as predicated upon grossly misleading statements of the issues and distortions of the case law relied upon.

A. The Airlines "Narrow Legal Issue"

The airlines would have this court believe that the appellants are truly persona non grata because they seek to try a different lawsuit from that raised by the pleadings, and are intruders bent upon delaying the disposition of this litigation to the detriment of the appellees (Brief of airlines pp. 15-18). This charge is without any foundation.

To sustain such a charge the airlines assert that the "plaintiffs have raised a narrow legal issue --whether the Port Authority has the power to ban Concorde flight operation at JFK". (Brief of airlines p. 11).

This characterization of the scope of this power and authority of the Port Authority as presenting a "narrow legal issue" is grossly misleading. It accurately describes an outcome that is sought by both the Port Authority and Appellants, and further constitutes, truly, a short-hand description of the tip-top of the iceberg of factual and legal considerations upon which the final determination must be made. Proof of this misleading characterization is readily available.

The complaint of the airlines, in which this "narrow legal issue" must find its origin is set forth in forty two (42) pages of this record (A2-A43), embracing four separate counts (A9, A22, A24, A30) and two exhibits (A33-A43). This "narrow legal issue", therefore is presented in four separate contexts: (a) Pre-emption, (b) Violation of airlines' treaty rights, (c) Violation of the federal government's exclusive authority to conduct foreign relations, and (d) Illegal Interference with foreign and interstate commerce.

These four sub-issues of this "narrow legal issue" are further subdivided into even more issues of law and fact. For

example: with respect to whether the Resolution of the Port Authority constitutes an unreasonable burden upon interstate or foreign commerce and is therefore invalid, must be determined by ascertaining whether its effect upon that commerce is incidental at best and not excessive when weighed against the legitimate and concededly laudable goal of protecting the appellants and the Port Authority -- Pike v. Bruce Church, Inc. 397 U.S. 137, 142 (1970).

That this presents a mixed factual and legal issue cannot be denied. This is the present state of a comparable legal proceeding entitled, Air Transport Association v. Crotti 389 F. Supp. 58 (DC Cal.1975). The Crotti case is pending before a three judge district court in which certificates of readiness nave been filed for a determination of the evidentiary issues presented with respect to the alleged unreasonable burden upon interstate commerce imposed by the statutory scheme of the State of California in controlling noise around airports through controlling the condition of use of the airport.

The "narrow legal issue" of the airlines also embraces the factual and legal issues raised by the interpretation of one treaty and two executive agreements (A22). While the interpretation of documents is basically for the court, it has been uniformly held that,

> "Of course, treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical consturction adopted by the parties."
> (emphasis added)
>
> Choctaw Nation v. U.S. 318 U.S. 423, 432 (1943)

The airlines contend that they have satisfied the requirements of the treaty and bilateral agreements. This is false as evidenced by the conduct of the parties. This is clearly a factual issue. The airlines further contend that, "These amended operations specifications (issued by the FAA) were the final items of authority required by plaintiffs to conduct Concorde operations at JFK" (airlines' Brief p. 3). This is just not correct. The course of conduct followed by the airlines over the past two decades pursuant to the treaty and executive agreements brands this interpretation by the airlines as inaccurate and false. There are other examples of factual issues in this area that illustrate the grossly misleading character of "the narrow legal issue" used by the airlines to disparge the right of these appellants to protect their interest.*

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* It should be remembered that the motion of the appellants was denied by Judge Pollack on July 6, 1976. At that time, either the appellants were entitled to intervene or be denied the right. Also at that time the airlines had not filed their motion for summary judgment. This latter motion was filed on July 12, 1976, and the answering papers of the Port Authority in opposition were required to be filed by August 17, 1976. (con't.)

The airlines "narrow legal issue" is a contrived delusion designed for the sole purpose of creating an adverse picture of the appellants. This "narrow legal issue", omitting one of the four counts (burden upon interstate and foreign commerce) is set forth in 62 pages of argument submitted by the airlines in support of their motion for summary judgment accompanied by 260 pages of appendix. The answer of the Port Authority is that there are no issues of material fact and utilized 65 pages of argument of this "narrow legal issue", accompanied by an appendix of 94 pages. The briefs of the two amici curiae collectively total 80 pages including appendices of over 300 pages, and these briefs are addressed to only two of the sub-issues. From the foregoing undisputed facts it is apparent that the "narrow legal issue" of the airlines is a figment of the imagination.

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*con't.

The record upon which Judge Pollack acted on July 6, 1976, and upon which this appeal is predicated was complete at that time. However, as can be seen from the airlines' brief much of their argument is drawn from events occuring subsequent to the filing of the notice of appeal on July 16, 1976. Appellants have no objection to this course of conduct and merely ask that this Court grant a like indulgence to the appellants.

The appellants did not appear as amici curiae opposing the summary motion because appellants did not wish to acquiesce in an order that purported to be a denial of appellants' rights as an intervenor, or take any action that could be considered as an acceptance of the correctness of said order.

This effort of the airlines to set up a record that ignores factual considerations which the Supreme Court has held should be considered in passing upon the "narrow legal issue"-- Bibb v. Navajo Freight Lines 359 U.S. 520 (1959) and Pike v. Bruce Church Inc. 397 U.S. 137, 142, (1970), does a gross injustice to the rights of the appellants to be heard as parties.

Neither of the parties sought discovery. The airlines submitted a Rule 9 (g) statement relating primarily to the capacity of the parties and other formal matters pursuant to the provisions of Rule 9 (g) of the United States District Court Rules for the Southern District of New York* It would seem that it would be beneficial to the Port Authority to have the airlines' admission that their course of conduct over the past 20 years in using the facilities of the Port Authority has been to recognize the right and power of the Port Authority to impose non-discriminatory restriction on the use of the JFK facilities by the airlines including noise restrictions.

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*"Rule 9 - Motions

*****

(g) Upon any motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party

*****

If the foregoing admission is not forthcoming, such an allegation should have been filed in the 9(g) statement by the Port Authority. This is in keeping with the proposed answer submitted by appellants (A74-A78) with their motion to intervene.

Does such a factual position augment the defenses of the Port Authority? Indeed, it does, and appellants should not be deprived of its effect. There are other elements upon which this "narrow legal issue" depends that are not before the Court at this time. As amici curiae the appellants have no right or authority to take discovery, offer evidence, appeal, or otherwise make a record. The appellants had no right to file a 9(g) statement, yet their rights are being determined on the basis of a record made by parties both of whom have interests that are adverse to those of the appellants. This is not justice.

In all candor, the ends of justice would undoubtedly be best served by the intercession of this Court in granting intervention in order to bring about the creation of a proper record upon which "the narrow legal issue" of the airlines may be determined. It seems apparent that any relief short of granting appellants' motion to intervene is patently ineffectual*.

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*See foot note on page 352 of 516 F2d in which this Court asserts that appellants have the right to assert their right to intervention even though they had been granted status of amicus. Also see foot note 10 on page 704 of 385 F2d for a statement of the material (con't.)

B. Immunization of Port Authority's Tort Liability To Appellants Presents An Interest Adverse To Appellants

The brief of the airlines dismisses this point with the observation that it "is without merit" (Airlines Brief p. 13). No reasons are advanced and no authority is cited to sustain this ipse dixit of counsel for the airlines.

In spite of the finding of Judge Pollack that his decision may immunize the tort liability of the Port Authority to the appellants (A113) the airlines assert that "there is not the slightest degree of meaningful adversity between applicants and the Port Authority in the context of the present suit" (airlines Brief p. 14). This further ipse dixit of counsel is devoid of any factual or legal support and flies in the face of Judge Pollack's finding of the impact of his decision as being an impairment (if not destructive) of appellants' rights and interest against the Port Authority.

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*. differences between an amicus and an intervenor. This is a complete answer to the airlines' contention that the interests of appellants are adequately protected by Judge Pollack's order granting them status as amici curiae.

It would be contrary to the laws of human nature to assume that the Port Authority will not seek a decision from Judge Pollack that will immunize its liability to the appellants. Indeed, counsel for the Port Authority owe an obligation to their client to seek such a decision. Who is going to represent the appellants before the District Court to prevent this result?

C. Airlines Confusion Concerning The Significance of "Same Outcome" Of Pending Litigation

The brief of the airlines lays much stress upon adequacy of representation being favorably determined by the fact that both parties "seek the same outcome" (airline Brief. p. 14).

This argument overlooks the very point that the decided cases make, namely, the interest of the applicant for intervention should be compared with the interest of the representative to determine if they are so different as to make doubtful adequate representation by one of the parties.

In Nuesse v. Camp, cited in the airlines brief p. 14, the Court of Appeals for the District of Columbia, in a well reasoned opinion, passed upon the issues presented to this Court. The proceeding below in the Nuesse case involved the interpretation of a federal banking statute and the intervention of a state banking

commissioner in an action brought by a state bank against the Comptroller of the Currency. The lower court denied the motion to intervene. This was reversed on appeal. The court stated:

> "***To agree that the ultimate question (outcome) is the meaning of a federal statute, however, does not mean that the state banking commissioner has no 'interest' in how that question is answered. For on this interpretation rests a large part of the advancement of the congressional policy of competitive equality between state and national banks." (emphasis added)
> 385 F2d 694, 701 (DC 1967)

So also in the case at bar. The Port Authority is seeking a favorable outcome which will prevent the Concorde from using JFK until compliance with the Port Authority Resolution. The appellants seek this same outcome. But the appellants are interested "in how that question is answered." The appellants are fighting to prevent any impairment of their interests such as was suggested by Judge Pollack in his finding.

As stated in Nuesse at p. 703

> "The tactical similarity of the present legal contentions of the state bank (alleged representative) and the state commissioner does not assure adequacy of representation or necessarily preclude the Commissioner from the opportunity to appear in his own behalf. Textile Workers Union v. Allendale Co. (matter is brackets ours)
>
> *****
>
> "We hold that there is a serious possibility that the Commissioner's interest may not be adequately represented by any existing party, and that he is entitled to participate as a party and not merely as a friend of the court. [10]"

Idem 704

In Holmes v. Government of Virgin Islands, 61 FRD 3 (1973) the court passed upon the impact of the fact that the applicants for intervention and one of the parties sought "the same outcome" upon the right to intervene. In granting intervention the court stated:

> "I must agree with the statement that 'the most important factor in determining adequacy of representation is how the interest of the absentee compares with the interest of the present parties'. ***Here, it seems that both parties will seek the same outcome: a determination that the passage of Bill No. 5588 was valid, or at least that the injunction sought would be improper. However, the interest of the intervenors is best characterized as similar, but not identical, to that of the Government.*** The Government is probably anxious to see the statute in question upheld so that the project can go forward. But it is not impossible to imagine that, as the litigation develops, the Government might conclude that a new statute passed under unquestionable circumstances might better serve their interest. Or, they might conclude that a change in the original plans was warranted and, therefore, the statute need not be vigorously defended. VIRCO (applicant for intervention), on the other hand, has a large, immediate financial interest to protect. It cannot afford to decide that governmental considerations warrant a determination that the law was invalid, with a view toward going ahead later under a new statute". (matter is brackets and emphasis ours)
>
> 61 FRD at 4-5

This is the type of analysis that Judge Pollack failed to make in the case at bar. Judge Pollack merely assumed, like the airlines, that seeking "the same outcome" is the determining criterion of adequacy of representation. Judge Pollack

never reached the significance of divergent interests nor the impact of adversity of interest upon the issue of adequacy of representation (A114). This constitutes reversible error.

See also the following cases, in which orders denying intervention were reversed, for proper analysis of interests and comparisons made to determine propriety of intervention: Ford Motor Co. v. Bisanz Bros. Inc. 249 F2d 22, 27-28 (8Cir.1957); Diaz v. Southern Drilling Corp. 427 F2d 1118, 1125 (5Cir.1970); Nuesse v. Camp 385 F2d 694, 700-701 (DC Cir. 1967); Kozak v. Wells 278 F2d 104, 109 (8Cir.1960); and New York P.I.R.G. v. Regents of Univ. of N.Y. et al. 516 F2d 350, 352 (2Cir.1975).

D. Airlines' Misinterpretation Of The Trbovich and New York P.I.R.G. Cases

It is to be noted that the airlines' analysis of Trbovich v. United Mine Workers (supra) and New York P.I.R.G. v. Regents (supra) is misleading (airlines Brief pp. 15-16).

The airlines assert with respect to the Trbovich case that the Supreme Court, "found material differences in interest between the Secretary of Labor and an individual union member seeking to intervene to challenge a union election because of potentially conflicting statutory duties imposed upon the Secretary

and found further that such differences were so substantial that the union member may have a valid complaint about the performance of his lawyer". This statement does not accurately reflect what the Supreme Court held.

The Supreme Court did hold:

> "The statute plainly imposes on the Secretary the duty to serve two distinct interests, which are related, but not identical. First, the statute gives the individual union members certain rights against their union, and 'the Secretary of Labor in effect becomes the union member's lawyer' for purposes of enforcing those rights. *** And second, the Secretary has an obligation to protect the'vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member'."
>
> 404 U.S. 538-539

The foregoing does not disclose the existence of any "potentially conflicting statutory duties", but merely that the "narrower interest of the complaining union member" is encompassed by or exceeded by the obligation of the Secretary to protect the public interest. Thus the Supreme Court authorized intervention where the two interests to be compared (not done by Judge Pollack in the case ar bar) were "related, but not identical". The reason given by the Supreme Court for ordering intervention:

> "Both functions are important, and they may not always dictate precisely the same approach to the conduct of the litigation. Even if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of 'his lawyer'. Such a complaint, filed

by the member who initiated the entire enforcement proceeding, should be regarded as sufficient to warrant relief in the form of intervention under Rule 24(a)(2)."

404 U.S. 539

This reasoning of the Supreme Court is peculiarly applicable here. The Supreme Court held that the mere fact that the union member complained about the performance of the Secretary of Labor was sufficient to justify intervention. There is no statement in the opinion of the court as to the nature of the substantiality of the alleged complaint, nor as to any facts giving rise to differences of interest. One interest is broader than the other. That is the only alleged difference.

In the case at bar the Port Authority has an interest in immunizing its tort liability to appellants. The appellants are concerned with protecting their ability to assert their interests unimpaired by the efforts of their would-be representatives. It is obvious that this adversity of interest demands that appellants' motion to intervene be granted, and in the light of the teachings of the Trbovich case (supra) it was reversible error to deny intervention by appellants.

With respect to the New York P.I.R.G. case the analysis of the airlines is equally misleading. The airlines assert that the interests of the applicants for intervention were different from that of the Regents and "these differences were

found to be so substantial as to go to the heart of the lawsuit" (airlines brief p. 16). This effort of the airlines to exaggerate the nature of the difference in the interests is inexcusable. The airlines also assert that, "the very substantial differences between the interests of the applicants for intervention and their representatives that indicated the likelihood that the two would seek different and incompatible outcomes in the case" (airlines Brief p. 16). This statement cannot be sustained as accurate on any basis but sheer guesswork on the part of the airlines. This Court never asserted that the differences in interest were "so substantial as to go to the heart of the lawsuit", nor that they would cause the two to seek "incompatible outcomes in the case.' This court did say:

> "Specifically, we are satisfied that there is a likelihood that the pharmacists will make a more vigorous presentation of the economic side of the argument than would the Regents. Indeed, the Regents acknowledged that the pharmacists should have an opportunity to make their own arguments to protect their own interests as pharmacists since, as the Regents admit their interests 'may significantly differ' from those of the pharmacists. We agree."
>
> 516 F2d 352.

There can be no doubt that this court authorized intervention where there was a significant difference in interests and that the applicants for intervention would make "a more vigorous presentation" than the party. In the case at bar, when the appellant

shows it can make "a more vigorous presentation" on an important element of the case, the airlines charge the appellants with seeking to "instigate" a different lawsuit*. Again, in the New York P.I.R.G. case this court found representation was inadequate on a record far less compelling than that of the case at bar.

The airlines' reliance upon United States v. International Business Machines Corp. 62 F.R.D. 530 (S.D.N.Y. 1974) is misplaced. This case makes it abundantly clear that the question of adequacy of representation is to be determined by what is learned from an analysis and comparison of the interests of the applicants for intervention with those of an existing party. The court stated:

> "Any inquiry with respect to adequate representation must necessarily focus on a comparison of the interests asserted by the applicants for intervention and the existing party.***"
>
> 62 F.R.D. 535

Judge Pollack did not make such an analysis in this case but was content to rest his decision upon the fact that "The Port Authority would appear to have as great an incentive to safeguard the extent of its power from the instant challenge as would any of the proposed intervenors. The motions to intervene as of right must therefore be denied" (A114). This failure of the District Court constitutes reversible error.

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*The Port Authority, because of its potential liability to the appellants, will keep a "weather eye" out as to the true impact of the operation of the Concorde on the appellants, thereby diminishing the need for and effectiveness of the Resolution as it relates to issues involving treaty rights and the burden on interstate and foreign commerce.

IV.

PERMISSIVE INTERVENTION

The brief of the airlines asserts that the District Court's denial of appellants' motion for permissive intervention should be sustained because no appellate court has heretofore reversed a district court's denial of such motion (airlines' brief p. 16). This is hardly a valid reason for sustaining an order which constitutes a clear abuse of discretion.

The fallacy of this argument by the airlines is exposed by the airlines continued reliance upon "the narrow legal issue". The "narrow legal issue" has been previously exposed in this brief as a pure figment of the imagination (supra. pp 14-20).

The appellants do not seek to relitigate the issues of public policy allegedly considered by Secretary Coleman. It should not be forgotten that the Sixth Defense (A78) set forth in appellants' proposed answer (A70-A79) was asserted before the Court of Appeals rendered its decision sustaining the decision of Secretary Coleman as complying with the procedural requirements of the National Environmental Protection Act. Since that decision, it is apparent that that decision is not subject to attack in the proceeding before Judge Pollack.

The brief of the airlines does not reach the predisposition of Judge Pollack against permissive intervention as an abuse of discretion, nor the speculative nature of the reasons

assigned by Judge Pollack in denying appellants' motion.

This record clearly reveals that the District Court's denial of appellants' motion to intervene pursuant to Rule 24(b) was reversible error.

CONCLUSION

The order of the District Court denying appellants' motion to intervene should be reversed and intervention by appellants directed so that they may take such lawful steps as are necessary to protect their interests in the proceedings now pending before Judge Pollack.

Since the appellants satisfy all the requirements of Rule 24(a)(2) they are entitled to intervene as a matter of right. At present, they are "absentees" whose rights and interests are directly affected by a decision of the lower court without having had an opportunity to be heard as a party. This is contrary to the fundamental concepts of natural justice.

It is also contrary to natural justice to expect that the interests of appellants can be adequately represented by the Port Authority whose interest is adverse to that of appellants, and whose every word and deed has traditionally and publically been

in opposition to appellants with respect to relief from jet noise.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 5th day of October, 1976, I served two copies of the foregoing Reply Brief of Appellants on each of the Appellees by mailing true copies thereof to the following counsel:

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admitted this _____ day of
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